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IN THE

Supreme Court of the United States

October Term, 1947
No. 213

E. J. STANTON & SON,

Plaintiff and Respondent,

vs.

COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,

Defendants and Appellants.

Petition for Writ of Certiorari to the Honorable District Court of Appeal, Second Appellate District, of the State of California, and Brief in Support Thereof.

TAYLOR, HENRY & CONRADIS,
By ALBERT E. CONRADIS,
712 Jackson Place, Washington, D. C.,
Attorneys for Petitioner.

STANTON & STANTON,
By LOUIS B. STANTON,
Of Counsel.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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Petition for Writ of Certiorari to the Honorable District Court of Appeal of the State of California, Second Appellate District.

To the Honorable The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Petitioner respectfully shows as follows:

Summary and Short Statement of Matter Involved.

Your petitioner is, and for upwards of 40 years last past, has been a corporation, organized under the laws of California, with its principal place of business, as an importer and wholesale of lumber, in the County of Los Angeles. Defendant City of Los Angeles is a municipal corporation and defendant County of Los Angeles is a political division of the State of California. Both are vested with taxing powers. The three causes consolidated for trial and decision, arose out of execution of said tax-

ing powers on lumber imported from foreign lands. The decision was exclusively upon a federal question of great importance, alike to importers and to taxing authorities of the State.

Taxes for general city and county purposes were assessed and levied by the Los Angeles County Tax Assessor upon hardwood lumber, owned and imported by petitioner from the Philippines, and various foreign countries. There were a total of 217,681 pieces of a value of $181,-154.01, which were assessed at $72,422.69 and taxes levied and paid of $2,980.57. Three tax dates are mentioned, respectively, the first Monday in March in the years 1939, 1940 and 1941. Payment under protest was made as to the 1940 and 1941 taxes and claim was made for repayment of the 1939 tax. The protest and claim respectively specifies that the assessment and tax levy was void as the lumber was imported from foreign lands and was immune from State taxation, by reason of Section 10, Article 1 of the United States Constitution.

Each piece of lumber subject to this tax was air-dried, milled, graded and marked for identification in foreign lands by the exporter prior to exportation. Petitioner unloaded it from the steamship carrier, then tallied, sorted for grade, color and thickness, and stacked it in piles or bins, with protective air strips. No change was made in any piece after receipt. Sales from time to time were made from the stacks. Replenishment was made from new shipments from the same exporter, of the same grade, color and thickness. Other than this replenishment it was not intermingled with other lumber. It is this lumber remaining after sales of a part of the entire shipment, replenished as stated, which is the subject of the case at bar.

The lumber came from South and Central American countries, Australia, Siam, as well as the various exporters in the Philippine Islands. Approximately the same method was adopted as to each exportation. A general blanket order gave the quantity, price, species, grade and dimensions required. The exporter filled the order as available shipping space developed. An importation received at one time might comprise shipments from two or more different exporters. Another shipment might be broken before customs entry and a part distributed to a foreign customer.

Each shipment was accompanied by the customary ocean bills of lading, invoices, certificates of inspection, insurance and consular certificates of origin. In each of these documents the respective pieces were described by the exporter for identification and marked as shown on Exhibit A [Tr. p. ....] in accordance with sections 1481 to 1484, inclusive, of Title 19, U. S. Code. The different pieces were never packaged together but were exported, carried and received separately in the shipment.

When deposited from the ships' cranes, petitioner tallied, inspected and sorted the lumber for grade, color, species and thickness. It was then brought to the yard and stacked in bins. Lumber from each exporter was kept separate from any other. Each plank in a stack was separated from the others by laths placed at each end and middle in order to permit air circulation and avoid rot. Nothing was done as to servicing, cutting, or drying, or in any ways changing the form of any individual plank.

Sales were made from these stacks and the lumber therein was held for sale in the usual course of business. New shipments from the same origin and of the same kind,

dimension, color and grade were used to replenish stocks depleted by said sales. Each piece continued to bear its original import mark of identification and was in the original form as imported, maintained separate from any lumber from other sources. This lumber is the subject of these actions.

Statement of Jurisdiction.

Petitioner, in its claim to the Board of Supervisors [Tr. p. ....] in its protest accompanying payments, also in its complaints [Tr. p. ....] specifically claimed the right, privilege, and immunity from State taxation of its imports of lumber from the Philippines and the foreign countries under the provisions of Article 1, Section 10, Clause 2 of the Constitution of the United States, reading as follows:

> "No state shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net Produce of all Duties and Imports laid by any State on Imports or Exports shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of Congress."

Suits were filed to recover each tax and consolidated for trial. No question as to the facts is raised. Defendants produced no evidence. Judgment was entered December 19, 1945 for recovery by petitioner of the full taxes involved. [Tr. p. .....] The finding and judgment of the trial court specifically set forth that the Federal Constitutional question was raised and determined in

favor of plaintiff. Appeal was duly made to the Supreme Court of California, which assigned the case for hearing to the District Court of Appeal. This Court on February 28, 1947, reversed the judgment of the trial court [Tr. p. ....] upon the Federal Constitutional ground as hereinafter discussed. Petition for hearing of the Supreme Court of California was duly made, which on April 17, 1947 denied this petition. [Tr. p. .....]

The decision of the District Court of Appeal approved by the California Supreme Court, devoted itself exclusively to the construction of the quoted Constitutional provision distinct from any State question, and held [Tr. p. ....]:

> "The controversy revolves about the question whether upon the sale of a portion of a shipment the remainder becomes subject to taxation."

It was the opinion of the District Court that by virtue of such sale the whole unsold shipment remaining in the hands of the importer unchanged in form becomes subject to taxation.

These actions, therefore, present a proper case for issue of Writ of Certiorari directed from this Honorable Court to the District Court of Appeal of the State of California, Second Appellate District, of California under the provisions of title 28, U. S. C., Section 344, Sub. b Judicial Code (Section 237, as amended) in order that this court may delimit the original package of import doctrine as applied to shipments of fungible merchandise.

Questions Presented.

The questions presented to the Court in this case concisely stated are:

(1) A bulk shipment of lumber, oil paper, fertilizer or cattle in regular course of trade, is imported from foreign lands. It is composed of indivdual pieces, boxes, barrels, packages or animals according to ordinary mercantile practices. The articles comprising said shipment are identified, carried, and passed by customs as individual items. Is it the total bulk shipment or the several individual items comprising the total import which constitutes the "original package of import" within the meaning of the Constitutional provision?

(2) Consequent upon importation does the sale of any one or more of the articles of import, comprised in the total shipment, subject the other articles therein, during the time when they are held in warehouse in their original state of importation by the original owners, to state taxation?

(3) Consequent upon importation does such handling of the articles of import as is solely essential to the preservation or completion of the mercantile transaction, such as tallying, sorting or stacking, subject these articles to state taxation?

(4) Consequent upon importation does the mere offering for sale of any one or more of the articles of import subject the unsold items to state taxation?

All of the said questions were duly raised and argued by your petitioners and appellees in said District Court of Appeal.

The Proceedings in the Trial Court.

The three cases covering the taxes for the year 1939, 1940 and 1941 were duly consolidated for trial and tried in the trial court. Evidence was produced oral and documentary, upon the part of plaintiff. The defendant submitted the case upon the evidence produced. It has been felt that the facts are sufficiently covered so that it is unnecessary to burden this court with the transcript of evidence upon the trial. The trial court ordered judgment for plaintiff upon all the cases and findings of fact and conclusions of law upon each and every of the issues raised was made by the trial court therein. The trial court held in accordance with plaintiff's theory that each of the separate articles of lumber constituted an original package of import; that inasmuch as there had been no change in any one of the original articles of import and as each of the original shipments was in the warehouse in the ownership of plaintiff, the State was forbidden under the Federal statute to levy any assessment. In other words, the issue of sale of one or more of the pieces was entirely immaterial. The immunity ceased after the piece was sold but that did not constitute a waiver as to any of the articles comprised in the shipments still on hand. The lumber had at all times been kept separate and distinct from the general mass of property of the state.

Decision of District Court of Appeal.

The opinion of the District Court of Appeal went upon the theory of the taxing authorities, that it is the shipment as a whole of fungible merchandise which constitutes the unit of importation, that whenever sale is made of any part of the total shipment, the original package is broken, the original unit of importation is broken, and the whole property is subject to state taxation. It states:

> "Although a cargo in bulk may arrive at the port of entry in irons, or wrapped and tied with hemp ropes, or encircled with silken thread or, as a herd of steers, have no binder at all, yet the entire shipment without regard to its exterior wrapping is the original package. A cargo of planks, timbers, or logs, imported from foreign lands is surrounded by the invisible gossamer woven of law, custom and convention which protects the merchandise from the local tax assessor only so long as it retains the unbroken wrapper in which it entered the port. But when such cargo sheds the invisible cover, even though in the warehouse of the importer, and is so sorted and classified as to facilitate its sale, and portions thereof are sold until the pile is depleted and the remnants thereof are commingled with new shipments of the same type of timbers, also to be offered for sale, then a reasonable construction of Section 10 and the decisions which have interpreted its meaning compel the termination of immunity from local taxation of such broken lots and commingled remnants of imported lumber."

Your petitioner here avers that in the brief attached hereto, it will be shown that there is not one case which can be offered in support of the fanciful construction

of this plain constitutional provision such as is made by the decision herein.

The Supreme Court of California denied petition for hearing before it without opinion.

Reasons for Allowance of Writ.

Your petitioner respectfully shows that these cases are of vital importance for the Government and State taxing authorities and of importers for the following reasons:

(1) The questions, particularly the first, involved in these cases are ones of exclusively Federal law which have not been finally determined by this court and which with the tremendous increase of foreign commerce of this nation, the current of bulk shipments and the increasing demands of State taxing authorities require final settlement by this court.

(2) The decision of the California Court in this case is in conflict with decisions of the State Courts of Louisiana, Kansas, New York, Missouri, Texas and Michigan as is particularly noted in the brief appended.

(3) The decision of the California Court in this case is in conflict with decision of the Circuit Court of Appeals for the Fifth Circuit as is particularly noted in the appended brief.

(4) The decision of the California Court in this case is in conflict with the trend of decisions of this court as noted in the brief appended.

(5) The decision in this case is and will be of far reaching application as there has been no decision by this Court on the original package rule as applied to

importations of fungible goods, where a part of the total shipment has been sold with the remainder in the hands of the importers.

Your petitioner shows in its brief hereto attached that this case is of great importance on each of the grounds above stated and therein presents the authorities and reasons to substantiate its position and presents herewith a certified copy of the entire record in said cause including trial court, the District Court of Appeal and the opinion of said court.

Wherefore, your petitioner respectfully prays that this Honorable Court order that its Writ of Certiorari issue directed to the District Court of Appeal of the State of California, Second Appellate District, and requiring that it certify to this court a full and complete copy of its proceedings and records in this matter for the purpose of review and revisal and for any other and further adjudication thereof that may to this court seem meet and proper.

Respectfully submitted,

TAYLOR, HENRY & CONRADIS,
By ALBERT E. CONRADIS,
Attorneys for Petitioner.

STANTON & STANTON,
By LOUIS B. STANTON,
Of Counsel.

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PETITIONER'S OPENING BRIEF.

Determination of conflicting theories between the state and federal courts on tax immunity in the importation for sale of foreign fungible merchandise in bulk cargoes is sought by this application for certiorari to the District Court of Appeal of the State of California.

This Honorable Court has never passed upon the precise question here involved. The trend of its decisions, however, has unquestionably indicated that the article rather than the shipment is given immunity under the constitutional provision. The rule of the federal circuit courts has uniformly been in favor of the article rather than the shipment as constituting the original package. The majority rule in the state courts has followed the federal rule. There are, however, two decisions in the state courts which indicate a view that the shipment rather than the article is the original package of import. These two cases are from the Supreme Court of Maine and the California Court in the case at bar.

The Supreme Court of the United States.

Starting with the basic premise[1] that "sale is the object of importation and is an essential ingredient of that intercourse of which importation constitutes a part" and advancing to the position[2] that "a tax upon the thing imported during the time it retains its character as an import and remains the property of the importer in his warehouse in the original form or package in which it was imported is a duty on imports within the meaning of the Constitution," the inevitable conclusion of the syllogism is read in[3] "Alabama was powerless without the consent of Congress to tax the nitrate before such sales or to require appellant by the payment of an occupation or franchise tax, or otherwise, to purchase from it the privilege of selling goods so imported and handled.

The uniform decisions of this court have held that it is the "article of import," not the entire shipment which is protected under the constitutional provision. It is likewise the uniform trend of the decisions of this court that no tax can be levied until after change in form or sale. The right to sell and to offer for sale imported merchandise is implied by the act of importation. This was the clear holding of *Brown v. Maryland, supra,* pages 537-448 of *May v. New Orleans* and of *Anglo-Chilean Nitrate v. Alabama.*

The description of the facts in this last case is very like the facts in the case at bar. From the date of qualification to the date of assessment, two years and a

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[1]*Brown v. Maryland,* 12 Wheat. 419, ... L. Ed. 678.

[2]*May v. New Orleans,* 178 U. S. 496, 44 L. Ed. 1165.

[3]*Anglo-Chilean v. Alabama,* 288 U. S. 224, 77 L. Ed. 710.

half, Anglo-Chilean Nitrate Company was regularly engaged in importing nitrate through Mobile and other ports, by numerous shipments. The nitrate was stored by appellant in its public warehouse. Sales were made from time to time. The amount on hand on March 31, 1930, was the aggregate of the various shipments, less the sales made. The tax was in the form of a franchise tax. Actually, however, under the facts stated, it was an *ad valorem* tax based on the value of the nitrate on hand as the case distinctly states the tax was at the rate of $2 per $1000 assessed value.

Hooven & Allison Co. v. Evatt, 324 U. S. 652-64-5, 89 L. Ed. 1252-63.

The opinion of the court states that fibres for use in the regular course of manufacturing requirements consisting of hemp, jute, sisal and others were imported from the Philippine Islands and other foreign points. Unquestionably this indicates that there were various different shipments. The fibres were utilized from time to time in manufacturing, and the Ohio State *ad valorem* tax was laid upon certain bales of hemp and other fibres stored in the original packages in which imported. Unquestionably these were depleted remnants of former total shipments. The particular ruling of the court upon the point in question is found under the heading "II" at the end of page 664. The court there held that the immunity from taxation continued until the goods were actually put to the use for which imported, that it mattered not whether the imported merchandise was stored in the importer's warehouse or in an interior state.

"No opinion of this court has ever said or indicated that imports held by the importer in the orig-

inal package and before they were subjected to the manufacture for which they were imported are liable to state taxation."

Another interesting point of the above case in connection with California law is that the court held therein that the Philippine Islands are not constitutionally united with the United States, although they belong to the United States, and that therefore articles brought from the Philippine Islands into the United States are imports subject to the constitutional provisions relating to imports and exempt from state taxation.

The Supreme Court of the State of California, in the case of *Dant & Russell v. Board of Supervisors,* 21 Cal. (2d) 534, held that goods which are shipped from the Philippine Islands and which come to rest in California are subject to state taxation.

Circuit Courts of Appeal.

The decisions of the circuit courts of appeal have likewise pronounced on the items composing the shipment as being the original packages of import rather than the entire shipment.

U. S. v. 65 Casks, 170 Fed. 449, was a drug misbranding case. The government claimed that the original package was the car which contained the 65 casks. The owner contended that each cask constituted an individual article of import. The Circuit Court of Appeal stated:

> "It seems to be clear that in this case the cask is the original package for the very simple reason that the car was wholly incompetent to package the liquid itself. The cask was a complete entity in itself, not connected or bound up with any other article but

capable of, and in fact, containing, some fifty gallons of this liquid, an amount capable thereby of being safely and conveniently handled and transported. Each cask was marked to the consignee and if separated from the car was capable of shipment independent thereof without either loss or inconvenience."

Galveston v. Mexican Pet., 15 F. (2d) 208.

The State Cases.

Lassater v. Purcell, 2 Tex. Civ. App. 33.

In the case of sacks of flour shipped in carload lots, it was held that the individual sacks were the original packages within the interstate commerce act.

State v. Winters, 44 Kan. 728.

In the case of live-stock transferred by the carload, it was held that the individual animals were the original packages, not the car.

Sales of Portions of the Shipment, Leaving Intact the Remainder in the Original Packages of Import, Do Not Constitute a Waiver of the Constitutional Exemption.

State v. Board of Assessors, 46 La. App. 145, Am. St. R. 318.

In this case the relators were importers of foreign goods. On the tax day they had in stock goods subject to such sales as had been made throughout the year. The City of New Orleans defended on the ground that the relators had by so offering the goods for sale and selling, caused their property to become mingled with the mass

of the property of the state. The court held against this contention as follows:

> "The fact that these goods are for sale in the store does not change their ownership nor necessarily have the effect of mingling them with other goods that are not in packages. The immunity from payment of taxes follows the goods without reference to the place in which they are stored. That they are offered for sale in unbroken packages in the importer's store, is not, in effect, a breaking of the package or such disposition of the goods as causes the immunity from the tax to end."

City of Detroit v. Paper Co., 202 Mich. 22-26.

In this case the facts as stated were that shipments of paper were received from Canada in Detroit. The shipments were broken. Some went directly to the customers. The remainder were sent to the warehouse for undetermined sale by rail or motor truck delivery. The court stated:

> "The question presented then is whether the goods had lost the character of imports when the tax was laid and had become a part of the general property of the state, liable to state taxation. When the tax was laid the goods were the property of the defendant or importer in its warehouse in the original form and package in which they were imported; that they had been or would be sold by the importer is true, but the right to sell them goes along with the right to bring them into the country."

Breaking of Bulk Into Tanks, Bags or Bins, Mixing With Prior Imports or Giving Economic Care to Imported Articles Does Not Constitute a Waiver of the Constitutional Ban.

Southern Pacific v. Calexico, 288 Fed. 639-42. (CALIFORNIA)—FEDERAL DISTRICT COURT.

In this case several different importations were made of baled cotton from Mexico under differing conditions. It is evident that it was a test case to determine the full rights. Some of the cotton bales after entry were compressed for further shipment. The City contended that by this act there was a waiver of the Ban. The Court applied the law to the different tests made and on this point held:

> "The compressing, which it is claimed the cotton suffered, however, did not substantially change the form, aspect or container of the thing imported. True it is that the cover was temporarily removed; but it was almost immediately replaced, and merely for the purpose of enabling the selfsame article, in no wise changed in character or extent, to be compressed into a smaller space that it might be shipped more economically. The agreed statement shows that the baled cotton must be compressed into a smaller space that it might be shipped more economically. The agreed statement shows that the baled cotton must be compressed before it will be accepted for shipment. To hold that it could not be compressed before shipment would be to hold, in effect, that it could not be shipped at all, and, therefore, could not be sold, without being subjected to the burden of the State government."

Mexican Pet. v. Louisiana, 173 La. 604-15.

This was a case where Mexican oil was delivered from a tanker into tanks on the shore. The additional feature in this case was that the crude oil was heated so as to make it flow into the storage tanks. It was claimed that this operation caused it to cease its protected character as an import. The case is a thorough review of the course and doctrine of immunity of import from taxation. It cites and relies upon Hamilton Fed. Vol. 1, p. 45; *License Cases,* 5 Howe, 504-75, 12 L. Ed. 256-288; *Sonneborn v. Keeling,* 262 U. S. 506, 67 L. Ed. 1097. Two grades of oil were imported. Each one of the tanks into which it was delivered held at least one thousand barrels of oil theretofore imported. The Court states:

> "It would seem also that the heating of the oil to make it flow, so that it might be pumped into the land tanks from the tanks on the ship is not, within the contemplation of Brown v. Maryland, such an acting upon the thing imported as to incorporate or mix it up with the mass of the property of the country, and the same is true within the contemplation of
>
> *Gulf Fisheries v. MacInery,* 276 U. S. 124.
>
> "Our appreciation of Brown v. Maryland and the authorities cited, resting mainly upon it, is not that the property must be imported necessarily in packages to be in a situation, after delivery, to retain its character as an import, but, where such is not the means of importation, it suffices that the import, to retain its character as such remains in the original form in which imported.
>
> "Some property is of such a physical nature that it is inexpedient, unwise or too costly to import it in packages. It was not the intention, however, to

exclude such property from the immunity of imports. Of this nature is crude oil. The only practical way of importing it is in bulk. To import it in barrels would make the oil too costly to be used in general commerce, whether for heating purposes or for the manufacture of the important articles of gasoline, kerosene, asphalt or other products. It is obvious that to deprive such importations of their immunity as imports would be a blow to the great oil industry of the state.

"The circumstances of pumping the oil into tanks, in unloading it, containing each about 1,000 barrels of the kind and quality pumped into it—a circumstance which could not be practically avoided in the ordinary course of things—did not cause the oil to lose its character as an import. There was no change here in the oil through a process of mixing, *for the oil put in each tank was identical in kind and grade with that already in it.* Besides, the record justified the conclusion that the *oil already in the tanks was oil imported by plaintiff and still retained its characted as an import and hence there was no mixing of the oil with oil that had become incorporated into the general mass* of the property of the country." (Italics added.)

In re Taxes, 32 Hawaii 431.

The taxpayer was engaged in the business of buying and selling materials used as fertilizers by sugar cane plantations. Some of the materials were brought from the mainland of the United States and some imported from South America and from Europe. Only about one-fourth or one-fifth of the material handled during each year was on hand on January 1st, the taxation date. There, therefore, in this case were numerous shipments from foreign

countries from which sales had been made and therefore there were on hand on the tax date "depleted cargoes."

The Court stated:

"Those of the imported materials which were on hand on the taxation date and still in the original bags in which they were imported are clearly within the rule laid down in *Brown v. Maryland*. They were still imports and not within the power of the Territory to tax the phosphate rock so brought in shipment in bulk. It could not have been stored in original packages if it did not come in any packages whatever. It would be an undue stretch of language to say that the ships were the original packages. The test as to the original packages does not apply in such a case. The phosphate rock within the decision of the Maryland case was in the warehouse of this taxpayer in the 'original form' in which it was imported, that is, it was in bulk. It was being kept in the warehouse, separate from the general mass of property in this Territory. The sole reason for removal of the nitrate of soda from the bags was as a precaution against fire, there being a peculiar fire hazard resulting from the combination of nitrate of soda and the bags. When subsequently sold these nitrates were again placed in bags and then they were stored in the warehouse of the taxpayer in bulk after removal from the bags. These nitrates were still the property of the taxpayer, had not been sold and were not mixed with the general mass of the property of the Territory. Within the contemplation of the Constitutional provision the nitrates still were, in our opinion, imports."

This case, upon the facts, is very similar to that of the case at bar. The State there claimed that the property had been mixed with the mass of the property of the country. There was much more reason than in the case at bar. The facts show that some of the materials were brought from the mainland of the United States. Certain processing for the maintenance of the security of the property was done in the *Hawaiian* case as it was here. There the nitrate was removed from bags, then replaced in bags when sold. Here the lumber was placed in stacks laid with stickers for preservation. In both cases there were successive shipments and importation and successive sales.

Opposing State Cases.

The two opposing state cases are found in California and Maine. The California case is that at bar, which goes upon the theory that the total shipment, irrespective of contents, constitutes the original package of import. The Maine case is that of *Mexican Petroleum Corporation v. City of South Portland,* 121 Me. 128, 26 A. L. R. 965.

In this case a tanker of oil came into South Portland from Mexico. The contents were pumped into four tanks on the shore. The court there held that the original package of import constituted the oil and the tank steamer itself; that by reason of the fact that the oil had been pumped from the tank steamer the original package had thereby been broken and the oil thereby mingled with the mass of the property of the state.

The rule of this case has been rejected in the following decisions:

Philippine Refinery v. Contra Costa, 24 Cal. App. (2d) 665;

Great Northern v. State, 93 P. (2d) 762 (Wash.);

Galveston v. Mexican Pet., 15 F. (2d) 208;

Mex. Pet. v. La. Tax Comm., 173 La. 604, 138 So. 117.

The State Courts have treated the subject under different phases. To clearly outline the cleavage the above grouping under subheads is made. In each instance there was the clear holding that the article rather than the shipment was protected by the Federal bar.

On Constitutional Questions, Federal Law Governs.

When constitutional rights or immunities are involved, this court, in cases coming to it from State courts will determine for itself from the record the existence of the controlling facts upon which such constitutional question is based.

Railroad Comm. v. Texas & P. R. Co., 229 U. S. 336, 57 L. Ed. 1215;

Coombes v. Getz, 285 U. S. 434, 76 L. Ed. 866;

Detroit United v. Detroit, 242 U. S. 238, 61 L. Ed. 268;

Kansas City Southern v. Albers Commission, 223 U. S. 573-91, 56 L. Ed. 556-65;

Truax v. Corrigan, 257 U. S. 312-25, 66 L. Ed. 254-60;

First Nat'l Bk. Hartford v. Hartford, 273 U. S. 548-52, 71 L. Ed. 767-70;

Fiske v. Kansas, 274 U. S. 380-5-6, 71 L. Ed. 1108-10-11;

Norris v. Alabama, 294 U. S. 587-9-90, 79 L. Ed. 1074-6-7.

Law and Custom Treat the Individual Plank as the Unit of Trade.

The rule of law has ever recognized that lumber is dealt with in the individual parcel or piece. The mark or brand placed upon the individual plank, for instance, always has been the visible designation or signature of the maker or exporter. Recognition of the fact that the log, plank, or board is the unit of package in the industry is established by law, which is the codification of the ancient custom and convention of the dealers in lumber is noted in:

Cal. Penal Code, Secs. 356 and 537E;

Burke v. Cassin, 45 Cal. 467;

63 Corpus Juris p. 308.

This general rule or custom is recognized in the Federal Statutes dealing with importation.

U. S. Code Title 19, Sec. 1481.

(a) All invoices of merchandise to be "imported into the United States shall set forth * * *"

(b) A detailed description of the merchandise, indicatting the name by which each item is known, the grade or quality, and the marks, number, or symbols, under which sold by the seller or manufacturer to the trade in the country of exportation, together with the marks and number of packages in which the merchandise is packed.

In the case at bar the original package was each individual piece of lumber; that was the identical thing de-

livered by the exporter to the carrier at the initial port of shipment; that was the identical thing carried by the carrier in the original package and delivered; that was the identical thing marked for and which passed through the customs and was received by the importer. There can be no doubt that, had one piece of lumber alone been shipped, it would have constituted the original package and not been subject to taxation. Had two or three or a dozen pieces of lumber been shipped, it is likewise obvious that each individual piece of lumber would have constituted an original package. The fact that there were thousands of individual packages did not change the character of each piece of lumber as an original package.

The "original package of import" is that which, in the customary channels of trade, merchandise is delivered to and carried by the carrier and by it delivered through customs to the importer. In early times, with small sailing ships, a Philadelphia merchant might, in one ship, by one shipment, import merchandise. It came to rest in his warehouse; later a part was sold in Virginia, another part in Georgia and a third part remained for sale in Kentucky. Under the rule announced by the District Court in the case at bar, on the Virginia sale the merchandise would become subject to Pennsylvania taxes and the cost of the merchandise to Georgia and Kentucky thereby increased to maintain the state government of another state. The constitutional debates show the manifest intention that the Federalist commercial states, by just some such means, would subject the Democratic agricultural southern and western states to tax levies.

Consider these shipments of lumber solely as fungible merchandise such as ore, bulk grain, oil, fertilizer. Disregard, as did the District Court of Appeals the identifying

marks of the exporter upon each plank; forget the ancient customs of dealing with lumber. What then is the rule?

Louisiana has said, as above noted, that such property is of such a physical nature that it is inexpedient, unwise, or too costly to import it in packages and the only practical way is the bulk importation. It is likewise inexpedient, unwise and too costly to transfer the contents of an entire tanker to one land tank. But Louisiana then held that "It is obvious that to deprive such importations of their immunity as imports would be a blow to the great oil industry of the State." Maine and California dissent but Michigan and Hawaii agree; likewise agrees therewith the Federal Circuit Court of Appeals.

Conclusion.

The States and the Importers are entitled to have a definite answer to the practical questions posed by Mr. Justice Black in his dissenting opinion to the *Hooven & Allison v. Evatt* case. When, if at all, can the State tax imports? He notes that previous opinions of this Court have indicated the difficulties and defects of the original package doctrine. This Court, vested as it is with the high principles of defining and delineating the Constitutional provision, has the duty and responsibility placed upon it of furnishing a definite guide to the practical questions to which this case gives rise.

"Sale is the object of importation." "While they (the lumber parcels) are in the hands of the importer for sale *in the form and shape in which they were introduced and in which they are intended to be sold,* they may be regarded merely as in transit." "A tax in any shape upon imports is a tax upon the consumer, by enhancing the

price of the commodity." "No opinion of this Court has ever said or indicated that imports held by the importer in the original package and before they are subjected to the manufacture for which they were imported are liable to State taxation."

Excerpts are the foregoing from the great decisions which, under the Federal Constitution, control both importer and State. Clearly is it shown under the facts and under the law that the tax levied in those cases were levied upon foreign importations while they were in the original form and shape in which they were imported and intended to be sold. The taxes laid were under the absolute ban of the Federal Constitution; they were subversive of the welfare of the nation and void.

Respectfully submitted,

TAYLOR, HENRY & CONRADIS,
By ALBERT E. CONRADIS,
Attorneys for Petitioner.

STANTON & STANTON,
By LOUIS B. STANTON,
Of Counsel.